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No. 03-1486 and 03-1491

In the Supreme Court of the United States

NORTHERN VOYAGER LIMITED PARTNERSHIP;
ONEBEACON AMERICA INSURANCE COMPANY f/k/a
COMMERCIAL UNION INSURANCE COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICI CURIAE* C-PORT, INC. And NATIONAL MARINE CHARTER ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

C-PORT

C-PORT, Inc. ("C-PORT"), is a national nonprofit membership organization. C-PORTS's membership is principally composed of individuals and businesses that provide assistance – including salvage services -- to mariners in the coastal waters of the United States. C-PORT serves as a collective voice for the marine assistance industry, and is the only national organization to do so. In addition to representing the industry in connection with pending legislation, C-PORT conducts an established and ongoing dialog and series of meetings with the senior officials at Coast Guard Headquarters Office of Search and Rescue.

NMCA

The National Marine Charter Association, Inc. ("NMCA") is an incorporated national nonprofit organization that represents the interests of the full spectrum of the marine charter industry.

Founded in 2003 to provide a unified and effective voice for all companies in the marine charter industry, NMCA fully represents and includes as members all types of charter firms, including sailing, fishing, diving, ecotours, water transportation, bareboats, and other excursion vessels. Thus, NMCA membership consists of firms ranging from small family-operated businesses to multi-vessel operations owning a range of both inspected and uninspected vessels.

The Growth of the Marine Assistance Industry

In 1982 Congress directed the United States Coast Guard to review its policies and procedures for towing and salvage of disabled vessels in order to minimize the possibility of Coast Guard competition or interference with private towing activities or other commercial enterprise. PL. 97-322, 96 Stat. 1581§ 113. As a result, the private marine assistance industry has grown into a 35 million dollar per year industry that is responsible for saving many times that amount of property from loss at sea.

The Importance of Salvage to the Environment

Of particular importance to the public is the considerable amount of environmental harm the salvage industry has helped to prevent or minimize worldwide. According to a survey conducted by the International Salvage Union, in 2003 that organization's members carried out 218 salvage operations that recovered more than 605,000 metric tons of potential pollutants, which included 71,833 tons of bunkers (fuel oil); 303,486 tons of crude oil; 61,177 tons of chemicals; and 169,181 tons of other pollutants. This total dwarfs the 37,000 tons of crude oil that was spilled when the EXXON VALDEZ grounded in Alaska in 1989, or the 77,000 tons lost when the PRESTIGE sank off the coast of Spain last year.

The Concern of Amici

While C-PORT has worked, and will continue to work, with the U.S. Coast Guard, C-PORT is highly concerned by the First Circuit's reading of 14 U.S.C. § 88. That court gave the Coast Guard the authority to order a mariner to desist from entirely voluntary efforts to save marine property.

C-PORT is concerned that the First Circuit's ruling will have the result of discouraging salvors from coming to the aid of vessels in distress.

Similarly, NMCA is concerned that the decision of the majority of the First Circuit panel threatens the safety of persons and property at sea. The ruling is likely to discourage mariners from requesting assistance from the Coast Guard, or may cause mariners to hesitate too long before calling for Coast Guard assistance, out of concern that the Coast Guard may interfere with salvage and rescue efforts, rather than simply offering assistance.

SUMMARY OF ARGUMENT

The decision of the majority of the First Circuit Panel is directly contrary to the public policy of the United States, as embodied in the opinions of this Court, the lower federal courts, and the treaties and Conventions to which the United States is a party. These affirmatively encourage mariners to take calculated risks to their own lives and property when engaging in efforts to save property from marine peril. This Court should grant certiorari to resolve the conflict between the majority of the First Circuit panel's decision and the previous decisions of this Court, and the other foregoing authorities.

ARGUMENT

THE DECISION OF THE MAJORITY OF THE FIRST CIRCUIT PANEL IS IN DIRECT CONFLICT WITH OPINIONS OF THIS COURT, OTHER COURTS OF APPEALS, AND TREATIES OF THE UNITED STATES GOVERNING THE LAW OF SALVAGE.

A. The Law of Salvage Encourages Risk of Life in Saving Maritime Property.

Salvage is the right of a party, who acts voluntarily to save property and the environment from marine peril and who is successful, either in whole or in part, to recover an award based on the property saved and the party's efforts in preserving the environment. A party performing salvage is entitled to an award, enforceable either *in rem* or *in personam*, up to the value of the saved property. *See, e.g.*, *The SABINE,* 101 U.S. (11 Otto.) 384 (1879).

> Compensation as salvage is not viewed by the admiralty courts merely as pay on the principle of *quantum meruit* or as a remuneration *pro opere et labore*, but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property.

The BLACKWALL, 77 U.S. (10 Wall) 1, 14, 19 L.Ed. 870 (1869). As one court recently explained, "In order to provide sufficient incentive for seamen to undertake the risks of salvage, awards are not limited to a strict *quantum meruit*; instead, they are more in the nature of a bounty." *Allseas Maritime, S.A. v. M/V Mimosa*, 812 F.2d 243, 246 (5th Cir.

1987). This "bounty" element is a critical aspect of salvage law.

This Court has made it clear that the risk involved in effecting salvage is one of the factors that a court should consider in issuing a salvage award. As was described in *The Blackwall* the factors to be considered in making an award are:

> (1.) The labor expended by the salvors in rendering the salvage service. (2.) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3.) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4.) The risk incurred by the salvors in securing the property from the impending peril. (5.) The value of the property saved. (6.) The degree of danger from which the property was rescued.

The BLACKWALL, id. at 14. These factors were essentially repeated in the Brussels Salvage Convention of 1910, to which the United States is a Party. *See*, Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, Sept. 23, 1910, art. 8, 37 Stat. 1658, 1671, 212 Consol. T.S. 187, 191. The factors were most recently updated to include recognition of efforts to prevent or minimize environmental damage in the London Salvage Convention of 1989. The United States became a party to the Convention in 1996. International Convention on Salvage, Apr. 28, 1989, S. Treaty Doc. No. 102-12 (entered into force July 14, 1996) ("SALCON 89").

Thus, the greater the risk to property and to salvors, the greater the reward, and the greater the incentive to a salvor to undertake a salvage operation. The award of salvage *encourages* mariners to risk their lives to save marine property. *See Dize v. The Steel Barge BEVERLY*, 247 F. Supp. 968 (E.D. Va. 1965) (stating that salvage "is given for services rendered at the risk of life"), *citing, The BLACKWALL, id.*

One relatively recent example involves salvage of a barge carrying an external fuel tank for the space shuttle – salvage of which the United States was a beneficiary. The Court of Appeals for the Fifth Circuit took into account that the salvors "incurred extremely high risk in securing [the barge and its cargo], both as to loss of their ship and lives and as to the creation of substantial environmental liability in the event of an oil spill." *Margate Shipping Co. v. The M/V JA ORGERON*, 143 F.3d 976, 985 (5th Cir. 1996).

Given the great hazards of any rescue operation at sea, if salvage law were not to take into account the risk of life in the amount of an award, much valuable property would be lost to the sea, for its rescue would be far less worth the risk to any rational party. *R.M.S. Titanic, Inc. v. Haver,* 171 F.3d 943, 962 (4th Cir. 1999); *The M/V JA ORGERON*, 143 F.3d at 986 n.2; *see also* William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. Leg. Stud. 83, 100 (1978) (arguing that the law of salvage exists to "encourage rescues in settings of high transaction costs by simulating the conditions and outcomes of a competitive market").

The decision of the majority of the First Circuit panel merits review by this Court because it seriously threatens the

"bounty" aspect of a salvage award – a legal principle that has literally taken millennia to evolve into its present form.

B. By Allowing the Coast Guard to Prevent Mariners From Rescuing Property Whenever the Coast Guard Considers that the Risk to Life is Great, the Decision of the Majority of the First Circuit Panel Discourages Parties from Undertaking Risky Salvage Operations and Seriously Reduces Incentives for Parties to Undertake Environmental Salvage.

The majority of the First Circuit Panel has read unprecedented powers into the text of 14 U.S.C. § 88(a)(1) that allows the Coast Guard to "perform any and all acts necessary to rescue and aid persons." The First Circuit interpreted this phrase to permit the Coast Guard to stop the Master of the NORTHERN VOYAGER in his efforts to save his own vessel. These efforts would have allowed a professional salvor (or even the crew alone) to prevent the loss of the vessel. Essentially, the majority allowed the Coast Guard to curtail private salvage operations anytime the Coast Guard in its sole discretion decides the operation is too dangerous for its liking.

To be sure, the panel majority attempted to limit this rule by requiring "an objectively reasonable belief by safety officers that a true emergency exists and there is an immediate need for assistance or aid." *Thames Shipyard and Repair Co. v. U.S.*, 350 F.3d 247, 259 (1st Cir. 2004). However, as the dissent noted, that limitation makes no sense, for, once an agency's actions come within the scope of the discretionary function exception, a court has *no jurisdiction* to further consider reasonableness of the exercise of that jurisdiction.

Id. at 270 (Torruella, J., dissenting), *citing Berkovitz v. U.S.*, 486 U.S. 531, 539 (1988).

Most importantly, it must be recognized that in *every* salvage situation, as a matter of the law of salvage, there *must* exist a real, or reasonably perceived, *marine peril*. *See, e.g., The SABINE* 101 U.S. (11 Otto.) at 384; *see generally Faneuil Advisors, Inc. v. O/S SEA HAWK*, 50 F.3d 88 (1st Cir. 1995) (denying an award of salvage where there was apprehension of, but not an actual, peril). Accordingly, the rule articulated by the majority of the First Circuit panel would allow the Coast Guard to call off virtually *any* operation that could hope to qualify for a salvage award – almost by definition.

If the decision of the majority of the First Circuit panel is the law, then in the future, a potential salvor will have to consider not only its own risk and potential reward (as has been the tradition of sea for centuries), but will have to also consider a new and discouraging calculus. In deciding whether to mount a salvage effort, the salvor will also have to consider the genuine risk that the Coast Guard may intervene, as was done in the case before the First Circuit, and thereby destroy the salvor's investment in the operation.

The case before the First Circuit provides a concrete example. The salvor, Mike Goodridge, had actually mobilized people, pumps, dive gear and a boat, and had almost reached the NORTHERN VOYAGER. The interference of the Coast Guard prevented him from saving the ship, and the award he could have earned was lost forever as the NORTHERN VOYAGER sank. But more than this, even if he had reached the NORTHEN VOYAGER and had invested hundreds of hours in saving it, the rule in the First Circuit would nevertheless allow the Coast Guard to force *him*

off – just as it did Captain Haggerty – sending his investment to the bottom with the ship. It is difficult to imagine a greater discouragement to the zeal and incentives that the marine industry (and court decisions) have attempted to nuture and cultivate in salvors over the centuries.

Similarly, if the decision of majority of the First Circuit panel is law, then a mariner in peril will be less likely to issue a distress call to the Coast Guard, or to anyone else who may overhear it, for fear that the Coast Guard will respond to the scene and interfere with the private salvage efforts that might stand a chance of saving the vessel. Indeed, for similar reasons, NMCA has been advised by several of its members in Alaska, that they have contracted with private firms to provide helicopter evacuation of crew members in emergencies, rather than risk interference by the Coast Guard in the management of their vessels.

Turning to environmental salvage, the First Circuit's rule would be especially harmful. In the first place, by allowing the Coast Guard, *without any accountability*, to order the abandonment of a vessel, the majority of the First Circuit panel encourages needless environmental damage and multiplies the expense of clean up and restoration. The expense of preventing or controlling a spill from a sunken vessel is almost always greater than the expense of controlling a spill when the vessel remains afloat. Indeed, in the case before the First Circuit, the owners of the NORTHERN VOYAGER, were required to spend some $350,000 to have the fuel oil pumped out of the tanks of their sunken vessel as she lay on the bottom.

If a fully laden commercial tanker had been involved rather than a fishing vessel, the results could have been catastrophic. In the recent sinking of the PRESTIGE off the

coast of Spain, the cost of clean-up is estimated to have been more than $700,000,000. Professionals estimate that had proper measures been taken before the vessel sank (prohibited in the case of the PRESTIGE) clean-up costs could have been capped at some $50,000,000.

Finally, in situations in which a vessel is spilling pollutants into the ocean, the rule adopted by the majority of the First Circuit panel would discourage salvors from mobilizing to prevent environmental harm. Potential salvors could not be sure whether the Coast Guard would force the abandonment of the polluting vessel, preventing the salvors from receiving an award. Without the availability of an award for saving the vessel, the incentives to carry out salvage are seriously reduced.

Section 14 of SALCON 89, S. Treaty Doc. No. 102-12 (entered into force July 14, 1996) , does provide for *some award* even if the polluting vessel is a loss. But that award may be capped at the salvor's "standard rates" (*e.g.*, for contract work), *see International Towing and Salvage, Inc. v. The F/V LINDSEY JEANETTE,* 1999 A.M.C. 2465 (S.D. Fla. 1998), or even at its bare out-of-pocket costs. *See Semco Salvage and Marine Pte. Ltd. v. Lancer Navigation Co. Ltd.*, [1997] A.C. 455, 1997 A.M.C. 1989 (House of Lords). This is far less than a classic salvage award in the nature of a "bounty." *See The M/V MIMOSA*, 812 F.2d at 246. Thus, the threat of Coast Guard interference leading to loss of the vessel (as here) presents a genuine discouragement by making any response effort less appealing in the eyes of a salvor.

If a salvor cannot save the vessel from loss, even the more modest (non-"bounty") compensation described above may be unavailable. This is because of the Limitation of Liability Act of 1851, 46 U.S.C. 183-188. This Act sets an aggregate cap

on recovery equal to the post-incident value of the ship, plus any freight revenue earned on the voyage. If the vessel is lost, this aggregate cap is likely to be quite modest. And a salvor must typically *share* it with other claimants, in a procedure similar to creditors sharing in the estate of a bankrupt debtor. *See Allseas Maritime, S.A. v. M/V Mimosa,* 812 F.2d 243 (5th Cir. 1987) (refusing to consider potential environmental damage in light of the Limitation of Liability Act of 1851).

As the above points illustrate, the prospect of Coast Guard interference is a grave threat to the economic incentive that is the life's blood of the salvage industry.

CONCLUSION

For the forgoing reasons, this Honorable Court should grant the Petitions for Certiorari in Nos. 03-1486 and 03-1491, so that the Court may review the judgment of the First Circuit Court of Appeals.

Respectfully submitted,

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